



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Denial of a Driveway Permit to
Krist Oil Company, Inc.

Case No.: TR-01-0022

FINAL DECISION

By letter filed on April 26, 2001, Krist Oil Company, Inc., requested a hearing to review the Department of Transportation's denial of its application for a permit to construct a driveway access from U.S. Highway 2 in Ashland, Wisconsin. Pursuant to due notice, a hearing was held in Ashland, Wisconsin, on July 12, 2001, before Mark J. Kaiser, Administrative Law Judge. On July 16, 2001, Krist Oil Company, Inc., filed a letter with exhibits related to this matter.

In accordance with Wis. Stats. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Krist Oil Company, Inc., by

Attorney Donn Atanasoff
303 Selden Road
Iron River, MI 49935

Wisconsin Department of Transportation, by

Attorney Matthew Schemmel
P. O. Box 7910
Madison, WI 53707-7910

The Administrative Law Judge issued a proposed decision on August 10, 2001. The Respondent and the Petitioner filed comments on the Proposed Decision on August 17, and 27, 2001, respectively. In its comments, the Department requested that portions of the Proposed Decision be clarified. One clarification sought by the Department was the statement in the introductory portion of the Proposed Decision that "[b]oth parties agree that the application should not have been processed pursuant to Wis. Admin. Code ch. Trans 233, but rather Wis. Stat. § 86.07(2)." The Department requested that this statement be amended to reflect that prior to February of 2001, the Department did not have sufficient information to determine that the

application should not have been processed pursuant to Wis. Admin. Code ch. Trans 233. If relevant, a reviewing court can decide whether the Department erred by initially treating the subject application as one filed pursuant to Wis. Admin. Code ch. Trans 233. However, to avoid the suggestion that the Division of Hearings and Appeals is making any finding on this issue, the reference has been amended to expressly state that the agreement of the parties referred to was at the time of the hearing.

Another clarification sought by the Department is to the statement in the introductory portion of the Proposed Decision indicating that the Department was “willing to grant a 40-foot wide access to the Krist Oil Company, Inc., property from U.S. Hwy. 2 as part of the Wis. Admin. Code ch. Trans 233 review of the application, but subsequently denied any access to U.S. Hwy. 2 under the Wis. Stat. § 86.07(2) review of the application.” The Department requested that this reference be clarified to reflect that the Department never approved a variance for an access from USH 2 to the Krist Oil Company, Inc., property, but rather that staff from its District 8 recommended the granting of such a variance. The Introduction section of the Final Decision has been amended to clarify the limited role of the district staff in the Wis. Admin. Code ch. Trans 233 review process.

The remaining comments filed by the parties are adequately addressed in the Proposed Decision. Other than the two clarifications discussed above, the Proposed Decision of the Administrative Law Judge is adopted as the Final Decision in this matter.

Introduction

At the outset of the hearing, the attorney for Krist Oil Company, Inc., (Krist) made a motion seeking to have its application for a driveway access to U.S. Hwy. 2 treated as filed in October, 2000, rather than February 12, 2001. An application for driveway access was submitted on behalf of Krist, by its engineers, on October 5, 2000. This application was processed by the Department of Transportation (Department) pursuant to Wis. Admin. Code ch. Trans 233. In a series of correspondence, Krist argued that its application should be considered pursuant to Wis. Stat. § 86.07(2), not Wis. Admin. Code ch. Trans 233. The confusion related to whether the application should be processed pursuant to Wis. Admin. Code ch. Trans 233, or Wis. Stat. § 86.07(2) was ultimately resolved and in a letter dated February 12, 2001, Mr. Atanasoff, on behalf of Krist, renewed its request for a driveway access to U.S. Hwy. 2. The Department then considered the application pursuant to Wis. Stat. § 86.07(2), and denied it by letter dated February 28, 2001. At the time of the hearing, both parties agreed that the application should not have been processed pursuant to Wis. Admin. Code ch. Trans 233, but rather Wis. Stat. § 86.07(2).

Krist sought to have the application deemed filed in October, 2000, rather than February 12, 2001, to show what it alleges is a pattern of illegal, conspiratorial, and fraudulent actions on the part of the Department. The Administrative Law Judge denied the motion; however, he did rule that Krist would be allowed to cross examine Department of Transportation witnesses on the only apparently relevant aspect of the Department’s activities between October, 2000 and February, 2001. Specifically, Krist would be allowed to ask why Department staff from its

District 8 recommended that a variance be granted for a 40-foot wide access to the Krist property from U.S. Hwy. 2 as part of the Wis. Admin. Code ch. Trans 233 review of the application, but the same staff subsequently denied any access to U.S. Hwy. 2 under the Wis. Stat. § 86.07(2) review of the application. Mr. Atanasoff and Krist Oil Company, Inc., found this ruling unacceptable and chose to leave the hearing without presenting any evidence. Since Krist Oil Company, Inc., has the burden of proof in this matter, the Department of Transportation's denial is summarily affirmed.

Findings of Fact

The Administrator finds:

1. By letter dated February 12, 2001, Krist Oil Company, Inc., (Krist), requested an entranceway from U.S. Highway 2 (USH 2) for a proposed service station/convenience store in Ashland, Wisconsin. The application for driveway access was submitted pursuant to Wis. Stat. § 86.07(2).
2. By letter dated February 28, 200[1], the Wisconsin Department of Transportation, District 8, Transportation Office denied the application for the reasons set forth in the letter.
3. By letter dated March 15, 2001, Krist appealed the district office's denial to the Department of Transportation's Director of the Bureau of Highway Development. By letter dated April 4, 2001, John Haverberg, the Director of the Bureau of Highway Development, affirmed the district office's denial of Krist's request for driveway access. The reasons for the affirmation of the denial are set forth in the April 4th letter.
4. By letter filed on April 26, 2001, Krist requested a hearing pursuant to Wis. Stat. § 86.073(3) to review the Department's denial of its application for a permit to construct a driveway access for USH 2. In response to that request a hearing was scheduled for July 12, 2001.
5. At the hearing, Krist presented no evidence in support of its appeal. Based on the lack of evidence in the record, no basis exists to find the Department's denial of Krist's application unreasonable. Accordingly, the Department's denial of Krist's application for driveway to USH 2 in Ashland must be affirmed.

Conclusions of Law

The Administrator concludes:

1. Krist Oil Company, Inc., has the burden to prove the Department of Transportation's denial of its application for driveway access to USH 2 was unreasonable. No evidence was presented at the hearing scheduled in this matter. Accordingly, Krist Oil Company, Inc., failed to satisfy its burden of proof.

2. Pursuant to Wis. Stats. §§ 86.07(3) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

The denial by the Department of Transportation of the application of Krist Oil Company, Inc., for a driveway access permit is affirmed.

Dated at Madison, Wisconsin on September 26, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
DAVID H. SCHWARZ
ADMINISTRATOR

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.